

Summary of SC93836, Zach McGuire, et al. v. Kenoma LLC, et al.

Appeal from the Henry County circuit court, Judge James K. Journey

Argued and submitted April 23, 2014; opinion issued November 12, 2014

Attorneys: The companies were represented by Jean Paul Bradshaw II, Chad E. Blomberg and Mara H. Cohara of Lathrop & Gage LLP in Kansas City, (816) 292-2000. The plaintiffs were represented by Anthony L. DeWitt, Edward D. Robertson Jr. and Mary D. Winter of Bartimus, Frickleton, Robertson & Gorny LLC in Jefferson City, (573) 659-4454; and Charles F. Speer and Peter B. Bieri of The Speer Law Firm in Kansas City, (816) 472-3560.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: Companies against which a nuisance judgment was entered appeal the trial court's subsequent amendment of the judgment, more than 16 months later, to add an award of post-judgment interest to the plaintiffs, retroactive to the date of the original judgment. In a unanimous decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri reverses this portion of the trial court's judgment but affirms it in all other respects. The amendment the trial court used is available only to correct clerical errors, to conform the judgment to what already is evidenced in the record. It is not available to make substantive changes to the judgment by adding to the judgment retroactively something that is not evidenced in the court's record.

Facts: A group of 12 plaintiffs sued Kenoma LLC and Synergy LLC, claiming their large-scale hog operations constituted a temporary nuisance. In May 2011, the trial court entered judgment against the companies following a jury trial awarding the plaintiffs damages. The judgment did not award post-judgment interest or state an applicable interest rate as prescribed in section 408.040, RSMo, nor did the plaintiffs file a timely post-trial motion to seek to amend the judgment or otherwise request the inclusion of post-judgment interest. The companies appealed the judgment, and the court of appeals affirmed the judgment in part and reversed it in part, but it did not need to remand (send back) the case to the trial court. The court of appeals decision became final in September 2012. A few days later, the plaintiffs filed a motion in the trial court asking the court to amend its judgment nunc pro tunc (correcting a clerical error) so they could receive post-judgment interest at a set rate retroactive to the date of the judgment. The companies opposed the motion. Following a hearing, the court verbally granted the plaintiffs' motion and subsequently entered its "Nunc Pro Tunc Journal Entry," retroactively amending the May 2011 judgment to award the plaintiffs the interest requested. The companies appeal.

AFFIRMED IN PART; REVERSED IN PART.

Court en banc holds: The trial court erred in issuing the nunc pro tunc judgment to include, retroactively, the post-judgment interest in its May 2011 judgment. Without any evidence in the record to show that the nunc pro tunc judgment merely corrected an omission of something that actually was done, the trial court's use of such a judgment was improper because the retroactive inclusion of the post-judgment interest substantively changed the judgment. Under Rule 75.01, a

trial court retains jurisdiction over its judgment for 30 days to vacate, reopen, correct, amend or otherwise modify its judgment. Any such judgment is considered a new judgment. Nunc pro tunc, originally a common law rule and now governed by Rule 74.06, allows a trial court that has lost jurisdiction over the judgment and case to maintain jurisdiction over its records to correct clerical mistakes in the judgment arising from either scrivener's (drafter's) errors or from omissions that are indicated in the record but are not recorded in the original judgment. Any nunc pro tunc judgment relates back to the date of the original judgment and cannot change the substance of the original judgment. As such, a nunc pro tunc correction is limited to that which actually was done. It may not be used to add anything to the judgment that is not already reflected in the judgment, even if the court should have included or intended to include the omission or has a laudatory motive in wanting to amend the judgment. Nunc pro tunc cannot even be used to amend the judgment by agreement or consent of the parties unless the agreement was part of the original record. Although the trial court failed to comply with the statute regarding post-judgment interest, this oversight or omission is not a clerical error but a substantive one. The presumption that a judgment is free from clerical errors can be overcome only if the clerical error is discernible from the record – recognizing the purpose of nunc pro tunc is to allow a court to make its judgment conform to the record, not to conform to the requirements of a statute. It is undisputed that the record shows no timely request for the inclusion of the applicable interest rate, nor does the record or original judgment include the statutorily mandated interest rate. As such, nunc pro tunc is not available as a remedy. Even if the trial court intended to include the post-judgment interest in its original judgment, and even if post-judgment interest is mandated by statute, an omission of an award of interest cannot be considered a mere clerical error. Such an omission is correctable by a post-trial motion pursuant to Rule 75.01 or Rule 78.07, but not by a nunc pro tunc judgment pursuant to Rule 74.06.